IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1216 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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STATE OF GUJARAT

Versus

JIVAN LAKHA

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Appearance:

MR. KC SHAH, APP for the appellant-State
MR. KJ SHETHNA for original complainant.
MR NITIN M AMIN for Respondents

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CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE SHARAD D.DAVE

Date of decision: 04/04/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

The acquittal of the respondents of the offences punishable under sections 302, 325 read with section 34 of the Indian Penal Code or sections 302, 325, 323, 114 read with section 504 of the Indian Penal Code and section 135 of the Bombay Police Act recorded by the learned Additional Sessions Judge, Mehsana vide judgment dated October 14, 1985 rendered in Sessions Case No. 24/85, is subject matter of challenge in the present appeal, which is filed under section 378 of the Code of Criminal Procedure.

2. Complainant Tejmal Khengarbhai Rabari is a resident of village Chhatral, Taluka : Kalol, District : Mehsana. The incident in question is alleged to have taken place on November 27, 1984. According to the prosecution, on the date of incident, the complainant was sitting on cot which was kept in the open part of his house with his brothers Muljibhai and Ramabhai Govindbhai. The prosecution has alleged that at about 1.00 P.M., respondent no.1 approached the complainant and asked the complainant and his brother Muljibhai to sign a letter wherein it was mentioned that Lila Hira was elected as President of Gopalak Mandal. The prosecution case is that the complainant and his brother refused to sign the said letter and asked respondent no.1 to convene a meeting of members of Gopalak Mandal, as the complainant and others were not taken into confidence before electing Lila Hira a President of the said Mandal. The prosecution has alleged that thereupon respondent no.1 got excited and started abusing the complainant and his brothers filthily and gave stick blows on the head and abdomen of Muljibhai. The prosecution has claimed that on commotion taking place, rest of the respondents also came near the cot whereon the complainant and his brothers were sitting and accused no.3 gave a stick blow on abdomen of the deceased; whereas accused no.4 gave a stick blow on back of head of Muljibhai and accused no.1 caused injuries on head and left hand palm of Ramjibhai Govindbhai when Ramjibhai tried to save Muljibhai. The prosecution has further claimed that on shouts being raised, Khengarbhai Ramjibhai, who is uncle of complainant Tejmal as well as Mafatbhai Jakshibhai and Govindbhai Ramsinhbhai came at the spot and saved the brothers of the complainant from further beating by the accused. It was also the case of the prosecution that the incident in question was witnessed by Ratanben Sartanbhai, who is sister-in-law of complainant Tejmal and is wife Kaharben. As Muljibhai had received serious injuries, he was removed to Kalol Government Hospital in

a private jeep, where he was treated by Dr. Vinodchandra K. Acharya. The doctor found that Muljibhai had sustained serious injuries in brain and, therefore, he advised the persons accompanying Muljibhai to remove him to Mehsana Civil Hospital. Accordingly, Muljibhai was removed to Mehsana civil Hospital, where he was treated by Dr. Baldevbhai B. Patel. Dr. Patel found that the general condition of Muljibhai was not good and it was necessary to have X'ray of the skull of Muljibhai. He, therefore, advised the persons accompanying Muljibhai to remove him to Ahmedabad Civil Hospital. At the time when Muljibhai was being taken to Ahmedabad Civil Hospital, complainant Tejmal did not accompany others, but went to Kalol Taluka Police Station for lodging First Information Report, wherein he named accused nos.1,3 & 4 as assailants. The F.I.R. was reduced into writing by Yogendrasinh K.Chudasma, who was then P.S.I. of Kalol Taluka Police Station. Injured Muljibhai was transferred to Ahmedabad Civil Hospital, where he expired. Autopsy on the dead body of the deceased was performed by Dr. Nayankumar N. Parikh and the F.I.R. lodged by Tejmal was further investigated. At the conclusion of investigation, the respondents were chargesheeted for the offences punishable under sections 302, 325 read with section 34 or in the alternative sections 302, 325, 323, 114 read with section 504 of the Indian Penal Code and section 135(1) of the Bombay Police Act. As the offence punishable under section 302 of the Indian Penal Code is exclusively triable by Court of Sessions, the case was committed to Sessions Court, Mehsana for trial, where it was numbered as Sessions Case No. 24/85. Charge under sections 302, 325 read with section 34 I.P.C. or sections 302, 325, 323, 114 read with section 504 I.P.C. and section 135(1) of the Bombay Police Act was framed by the learned Additional Sessions Judge, Mehsana against the respondents. The charge was read over and explained to the respondents, who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) Dr. Baldevbhai B.Patel as P.W.1 at Ex.29, (2) Dr. Nayankumar N. Parikh as P.W.2 at Exh.33, (3) Dr. Bhaktibhai V. Prajapati as P.W.3 at Exh.34, (4) complainant Tejmal Khengarbhai as P.W.4 at Exh.36, (5) Ramabhai Govindbhai as P.W.5 at Exh.40, (6) Ratanben Sartanbhai as P.W.6 at Exh.41, (7) Govindbhai Ramsinhbhai as P.W. 7 at Exh.43, (8) Mafatbhai Jaksibhai as P.W.8 at Exh.44, (9) Jakirhusen Martumiya as P.W.9 at Exh.45, (10) Rafuddin Faijuddin as P.W.10 at Exh.47, (11) Yogendrasinh K. Chudasma as P.W.11 at Exh.50, and (12) Dr. Vinodchandra K. Acharya as P.W.12 at Exh.53, and also produced documentary evidence,such as, complaint filed by Tejmal Khengarbhai, postmortem notes prepared by Dr.

Nayankumar Parikh, inquest report, discovery panchnama etc. to prove its case against the respondents. After recording of evidence of prosecution witnesses was over, the learned Judge recorded statements of the respondents under section 313 of the Code of Criminal Procedure. In their further statements, the respondents stated that the case of the prosecution against them was false, but did not examine any witness in support of their defence.

3. On appreciation of evidence, the learned Judge held that it was proved by the prosecution that deceased Muljibhai had died a homicidal death, but it was not proved by the prosecution beyond reasonable doubt that the respondents had caused injury to the deceased. In that view of the matter, the learned Judge has acquitted the respondents by judgment dated October 14, 1985 giving rise to the present appeal.

4. Mr. K.C. Shah, learned A.P.P. and Mr. K.J.Shethna, learned Senior Counsel appearing for the complainant, after taking us through the entire evidence on record,submitted that the evidence of complainant Tejmal Khengarbhai to the effect that accused no.1 had caused injury on head of the deceased by means of a stick and had also caused injuries on head and left hand palm of Ramabhai Govindbhai, is amply corroborated not only by his complaint, but by sworn testimonies of witness Ramabhai Govindbhai, Ratanben Sartanbhai, Govindbhai Ramsinhbhai as well as Mafatbhai Jaksibhai and, therefore, the respondents ought to have been convicted of the offences with which they were charged. The learned counsel appearing for the prosecution further claimed that the evidence of eye witnesses is corroborated in material particulars by medical evidence on record and, therefore, the learned Judge was not justified in acquitting the respondents. The learned counsel maintained that the learned Judge has committed apparent error in appreciating the evidence led by the prosecution and, therefore, on reappreciation of evidence, appeal against the respondents should be accepted.

4-A. Mr. Nitin M. Amin, learned counsel pointed out that as per instructions received by him, respondents no.2 & 4 have expired and, therefore, acquittal appeal against them should be treated as having abated in terms of section 494 of the Code of Criminal Procedure. The learned counsel for the defence pleaded that the incident in question had not taken place in open part of the house of the complainant as alleged by the prosecution, but had taken place in the chowk near the house of the

complainant and as evidence of the witnesses did not inspire confidence of the learned Judge, who had an opportunity of observing demeanour of the witnesses, appeal should not be allowed. The learned counsel referred to the medical evidence on record and urged that as the so-called eye witnesses stand contradicted with the medical evidence, the learned Judge did not commit any error in not believing the testimonies of the witnesses. Lastly, the learned counsel submitted that even if another view of the matter is possible, this Court should not substitute the view taken by the learned Trial Judge in the present acquittal appeal and the appeal should be dismissed.

5. We have taken into consideration the submissions made at the Bar as well as the evidence on record. The statement made by Mr. Nitin M. Amin, learned counsel, to the effect that respondents no.2 & 4 have expired is not disputed by the learned Additional Public Prosecutor or by the learned counsel appearing for original complainant. Normally, we would have insisted for production of death certificates of respondents no.2 & 4 in order to pass consequential order in terms of section 494 of the Code. However, as the statement made by the learned counsel for the defence is not disputed, we hold that the acquittal appeal against respondents no.2 & 4 has abated in terms of section 494 of the Code of Criminal Procedure.

From the record of the case it is evident that no blood stains were found either at the Osari i.e. open part of the house of the complainant or on the cot whereon, according to the prosecution, the complainant and his brothers were chitchatting. Therefore, it becomes highly doubtful whether the incident had taken place in the Osari of the complainant as claimed by complainant Tajmal Khengarbhai and other witnesses, who are closely related to him. According to the prosecution, respondent no.1 had approached the complainant with a letter and asked him to sign the said letter wherein it was mentioned that Lila Hira was elected as President of Gopalak Mandal. It is relevant to notice that the said letter could not be secured by the investigating agency, nor could be produced before the Court. Therefore, it is doubtful whether, in fact, respondent no.1 had approached the complainant with any letter and had demanded his signature as alleged by the prosecution. Further the complainant and other witnesses have maintained before the Court that respondent no.1 had given stick blow on abdomen of the deceased and respondent no.3 had also given stick blow on the abdomen

of the deceased, but Dr. Nayankumar Parikh, who had performed autopsy on dead body of the deceased, did not notice any injury on the abdomen of the deceased. This means that either the witnesses had not seen the incident or they have tried to implicate the respondents falsely. The learned Judge has held that there are several contradictions appearing in the evidence of complainant Tejmal with reference to his complaint and those contradictions have been enumerated by the learned Judge in Paragraphs 10 to 12 of the judgment. For the purpose of deciding the question whether any offence punishable under section 302 of the Indian Penal Code is made out against any of the respondents, it would be relevant to refer to the evidence of Dr. Nayankumar Parikh who had performed autopsy on the dead body. Dr. Parikh in his deposition has clearly stated that abrasions below left eye and chin of the deceased were possible by a fall resulting into fracture of skull. The prosecution has not satisfactorily proved as to whether the so-called blow either given by accused no.1 or accused no.4 caused fracture of skull of the deceased. So far as injury to Ramabhai Govindbhai is concerned, Dr. Baldevbhai Prajapati, who had treated him, has categorically stated in his cross-examination that he was not able to say definitely as to what was the age of injury and that fracture of finger was possible by a fall. It is also mentioned by the doctor that no external injury on finger was noticeable and he had not noted down whether the injury sustained by Ramabhai Govindbhai was bleeding one or not. The most surprising aspect of the matter is that the prosecution had examined Dr. Bhaktibhai V. Prajapati as P.W.3 at Exh.34 for the purpose of proving the case that the respondents or any of them had caused injury to one Vaghjibhai Mafatbhai. The prosecution did not examine Vaghjibhai Mafatbhai at all, nor it is stated by the complainant or any of the witnesses that the respondents or any of them had caused any injury to said Vaghjibhai Mafatbhai. Therefore, we fail to understand as to why Dr. Prajapati was examined by the prosecution. Dr.Prajapati in his cross-examination has admitted that on November 28, 1984 he had occasion to treat accused nos.2,3 & 4 and he had found injuries on them. Though the injuries which were noticed by Dr. Prajapati on accused nos.2,3 & 4 were not serious, the fact remains that the respondents had sustained injuries regarding which no explanation is offered by any of the prosecution witnesses. Non-explanation of minor injuries, by itself, may not disprove the case of the prosecution, but viewed in the light of several lacuna in the case of the prosecution, non-explanation of the injuries plays an important role. Under the circumstances, we are of the

opinion that the principles laid down by the Supreme Court in LAKSHMI SINGH & Ors. v. STATE OF BIHAR, AIR 1976, S.C. 2263 would be applicable to the facts of the present case. On reasonable reading of evidence of prosecution witnesses, we are satisfied that the prosecution has suppressed the genesis and origin of the occurrence and has not presented the true version of the incident and non-explanation of the injuries sustained by the respondents makes defence version probable that the incident had not occurred at the place as alleged by the prosecution, but had occurred at some other place. This is an acquittal appeal in which Court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of learned Judge who had opportunity to observe the demeanour of the witnesses. As we are in general agreement with the view expressed by the learned Judge, we do not think it necessary either to reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given by the Trial Court, and in our view, expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the present case. This is so, in view of the decisions rendered by the Supreme Court in (1) Girija Nandini Devi & Ors. v. Bijendra Narain Chaudhary, A.I.R. 1967 S.C. 1124, and (2) State of Karnataka v. Hema Reddy and anothers, A.I.R. 1981 S.C. 1417. On overall appreciation of evidence, we are satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondents. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the respondents and the learned Additional Public Prosecutor as well as the learned counsel for the complainant have failed to dislodge the reasons given by the learned Judge in order to convince us to take the view contrary to the one already taken by the learned Judge.

The net result of the above discussion is that we do not find any reason in the appeal and the appeal is liable to be dismissed.

The appeal, therefore, fails and is dismissed. The muddamal articles to be disposed of in terms of directions given by the learned Judge in the impugned judgment.

(J.M.Panchal,J.)

( S.D.Dave,J. )

(patel)